

15. New Regulatory Mechanisms

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Summary

15.1 This chapter sets out proposals and questions about new regulatory mechanisms to reduce and redress serious invasions of privacy. The new regulatory powers proposed in this chapter are not intended to be an alternative to the new tort. The ALRC considers that these powers could operate alongside the new tort.

15.2 Two regulatory bodies are considered. The first is the Australian Communications and Media Authority (ACMA) which has powers relating to the broadcast media under the *Broadcasting Services Act 1992* (Cth). The second is the Office of the Australian Information Commissioner (OAIC) which has powers relating to information privacy under the *Privacy Act 1988* (Cth).

15.3 In this chapter, the ALRC first proposes that the ACMA be empowered to make a determination that a complainant should be compensated where a broadcaster's conduct amounts to a serious invasion of the complainant's privacy in breach of a broadcasting code of practice. The proposed new power of the ACMA would be similar to existing powers of the OAIC.

15.4 Secondly, the ALRC proposes the introduction of a new Australian Privacy Principle (APP) which would require APP entities to take reasonable steps to delete personal information about an individual on request. The ALRC has also asked a

question about a possible take-down system that would empower a regulator to require an organisation to remove information about an individual from a website or online service, where the publication of that information is a serious invasion of privacy. The regulator would be required to have regard to freedom of expression and other public interests. This may be a fast, low-cost mechanism to limit the risk, extent, and harm of a serious invasion of privacy.

15.5 Thirdly, the ALRC proposes that the statutory functions of the Australian Information Commissioner¹ be amended to include acting as *amicus curiae* and intervening in appropriate court proceedings, with leave of the court.

15.6 In this chapter, the ALRC also discusses the small business exemption to the *Privacy Act* and an extended complaints process for the OAIC.

Expanding the ACMA's powers

Proposal 15–1 The ACMA should be empowered, where there has been a privacy complaint under a broadcasting code of practice and where the ACMA determines that a broadcaster's act or conduct is a serious invasion of the complainant's privacy, to make a declaration that the complainant is entitled to a specified amount of compensation. The ACMA should, in making such a determination, have regard to freedom of expression and the public interest.

Existing powers of the ACMA relating to codes of practice

15.7 The ACMA has regulatory powers over broadcasting (including radio and television) and telecommunications. These powers are granted primarily under the *Australian Communication and Media Authority Act 2005* (Cth), the *Broadcasting Services Act 1992* (Cth), the *Telecommunications Act 1997* (Cth). Regulatory powers in relation to specific privacy issues are also granted to the ACMA under the *Spam Act 2003* (Cth) and the *Do Not Call Register Act 2009* (Cth).

15.8 The ACMA's powers are primarily exercised by promoting self-regulation (in which industry members regulate themselves under industry guidelines, codes or standards) and co-regulation (in which industry members develop guidelines, codes or standards that are enforceable under legislation).

15.9 Privacy provisions with public interest exceptions exist in a range of broadcasting industry codes of practice. The privacy provisions of the codes relating to broadcasters are limited to broadcasts of news and current affairs programs.²

1 The *Privacy Act 1988* (Cth) currently confers a number of functions on the Australian Information Commissioner.

2 Commercial Television Industry Code of Practice 2010 cl 4.3.5; Commercial Radio Codes of Practice and Guidelines 2011 cl 2.1(d); ABC Code of Practice 2011 cl 6.1; SBS Codes of Practice 2014 cl 1.9.

15.10 If a code is breached, the ACMA may: determine an industry standard;³ make compliance with the code a condition of the broadcaster's license;⁴ or accept an enforceable undertaking from the broadcaster that the broadcaster will comply with the code.⁵ Further consequences—including civil penalties, criminal penalties, and suspension or cancellation of a broadcaster's license—exist for a breach of a standard,⁶ a license condition⁷ or an enforceable undertaking.⁸

15.11 Distinct powers exist if a complaint is made against the ABC or SBS. In these cases, the ACMA may recommend that the broadcaster take action to comply with the relevant code, or that the broadcaster take other action including publishing an apology or retraction.⁹

15.12 The ACMA does not have the power to determine that compensation be paid to an individual whose privacy has been seriously invaded by a broadcaster.

An extension of the ACMA's powers

15.13 The ALRC's proposal would grant a new power allowing the ACMA to make a declaration that a complainant should be compensated for any loss or damage suffered from a serious invasion of privacy by a broadcaster. This would provide the ACMA with a power similar to that held by the OAIC under the *Privacy Act 1988* (Cth).¹⁰ However, the relevant provisions of the *Privacy Act* do not apply to a media organisation acting in a journalistic capacity if the organisation has publicly committed to observing privacy standards.¹¹

15.14 Granting this power to the ACMA would help to address the limitation of the *Broadcasting Services Act* that an individual is not entitled to compensation or other forms of personal redress when their privacy is invaded in breach of a broadcasting code of conduct. Granting this power would also provide consistency between the powers of the OAIC and the powers of the ACMA in respect of privacy.

15.15 Under this proposal, the ACMA would be empowered to make a declaration for compensation only in cases where an invasion of privacy was serious. This condition would not be met by all invasions of privacy under relevant codes of practice.

15.16 It is important to note that any determination made by the OAIC under s 52(1A) of the *Privacy Act* must be enforced in the Federal Court or Federal Circuit Court.¹² A

3 *Broadcasting Services Act 1992* (Cth) s 125.

4 *Ibid* s 44.

5 *Ibid* s 205W.

6 *Ibid* pt 9B div 5.

7 *Ibid* pt 10 div 3.

8 *Ibid* pt 14D.

9 *Ibid* ss 150–152.

10 Under s 52(1A)(d) of the *Privacy Act*, the Australian Information Commissioner, in response to a complaint, may make a determination including a declaration that the respondent pay an amount of compensation to the complainant.

11 *Privacy Act 1988* (Cth) s 7B(4).

12 *Ibid* s 55A.

similar procedure would be required to enforce a declaration made by the ACMA under the new power proposed by the ALRC.

15.17 Strengthening the ACMA's powers in respect of serious invasions of privacy would help deter serious invasions of privacy by broadcasters and provide individuals with an alternative to costly litigation.

15.18 Any expansion of the ACMA's powers would need to take into account the self-regulatory nature of the *Broadcasting Services Act*. One of the objects of the Act is to '[enable] public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services'.¹³ The ACMA similarly noted in its submission that:

The relevant legislative framework therefore requires the ACMA to provide industry with the opportunity to develop co and self-regulatory solutions, before other forms of intervention are considered.¹⁴

15.19 The power to be exercised under this proposal would only be engaged where there has been a failure to comply with a self-regulatory code. The proposed power would be arguably less burdensome on media organisations than alternative mechanisms for increasing privacy protections, such as removing the media exemption to the *Privacy Act 1988*.

15.20 Some media organisations submitted that any additional privacy protections would impose an excessive regulatory burden on the media and may have a chilling effect on responsible journalism.¹⁵ While the ALRC acknowledges the range of laws affecting media organisations, it should be noted that many of these laws protect privacy only in an incidental and limited way, and that there are significant gaps and deficiencies in the protection of privacy.¹⁶ It should also be reiterated that the proposed extension to the ACMA's powers would only apply to those complaints which are serious and for which there is no overriding public interest justification.

15.21 There is some evidence that privacy complaints against the media are relatively rare. The ACMA's 2012–13 Annual Report showed that, while there were a total of 2178 enquiries and written complaints about commercial, national and community television broadcasters, there were only two breach findings relating to privacy by commercial television broadcasters, and only three non-breach findings.¹⁷ Rather than providing evidence that no further privacy protections are needed, the ALRC suggests

¹³ *Broadcasting Services Act 1992* (Cth) s 4(2).

¹⁴ Australian Communications and Media Authority, *Submission 52*.

¹⁵ SBS, *Submission 59*; Free TV, *Submission 55*; The Newspaper Works, *Submission 50*; Australian Subscription Television and Radio Association, *Submission 47*; ABC, *Submission 46*. The submission from Free TV included a list of existing laws affecting media organisations, including laws relating to: trespass; nuisance; confidential information; defamation; malicious falsehood; contempt; data protection (however, as noted above, the *Privacy Act 1988* (Cth) contains an exemption for media organisations); criminal trespass laws; restrictions on reporting matters affecting or involving children, adoption, coronial inquiries, sexual offences, jurors, and prisoners; court orders to make orders restricting reporting of court proceedings; anti-discrimination; restrictions on reporting certain types of activity under, for example, the *Australian Security Intelligence Organisation Act 1979* (Cth); family law; and surveillance devices.

¹⁶ See Ch 3 for further analysis of existing laws.

¹⁷ 'Annual Report 2012-13' (Australian Communications and Media Authority) app 6.

that the ACMA's figures indicate that the additional power proposed may be rarely used. However, the proposed power would provide a means of redress and alternative dispute resolution to affected individuals without the high cost for both parties of litigation.

A new privacy principle for deletion of personal information

Proposal 15–2 A new Australian Privacy Principle should be inserted into the *Privacy Act 1988* (Cth) that would:

- (a) require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and
- (b) require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance.

Question 15–1 Should the new APP proposed in Proposal 15–2 also require an APP entity to take steps with regard to third parties with which it has shared the personal information? If so, what steps should be taken?

The importance of deletion

15.22 Several submissions to the Issues Paper noted that the harm caused by a serious invasion of privacy in the digital era will often increase the longer private information remains accessible.¹⁸ Ensuring that individuals have a means to rapidly remove such information is one way to reduce the availability of private information. This proposal, if enacted, would provide a mechanism to assist individuals in having certain personal information destroyed or de-identified. The risk of that information being misused or disclosed in the future would thereby be reduced.

15.23 This proposal would not provide a mechanism to allow individuals to request the deletion of private information posted about them by other individuals or organisations. In this respect, the proposal is significantly different from the 'Right to be Forgotten', which has been considered in the European Union¹⁹ and which was referred to in the Issues Paper.²⁰

18 National Children and Youth Law Centre, *Submission 61*; Google, *Submission 54*; Australian Privacy Foundation, *Submission 39*; B Arnold, *Submission 28*.

19 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)' art 17. The right to be forgotten would be subject to limitations protecting, among other things, freedom of expression and the public interest in public health.

20 Australian Law Reform Commission, 'Serious Invasions of Privacy in the Digital Era' (Issues Paper 43, 2013) 50.

Limits of the proposed privacy principle

15.24 The proposed privacy principle includes two key requirements. First, an APP entity (as defined in the *Privacy Act 1988* (Cth)) would be required to provide a mechanism for individuals to request the deletion or de-identification of personal information held by that entity. Such a mechanism is already provided by some online services, allowing individuals to delete information that they have previously added to the service.²¹

15.25 The second element of the proposal would require an APP entity that receives such a request to take reasonable steps to destroy or de-identify the relevant personal information in a reasonable time. Such a requirement would be subject to certain exceptions including, for example, where the information is required by law to be retained.²² An organisation which did not destroy or de-identify the information would be required to provide the requesting individual with the reason for its decision.

The context of the *Privacy Act*

15.26 The proposed privacy principle would be contained within the *Privacy Act 1988* (Cth), along with the thirteen existing Australian Privacy Principles (APPs). The existing APPs include similar, but weaker, requirements. First, an APP entity must take reasonable steps to correct personal information held about an individual at the individual's request.²³ Second, an APP entity must destroy or de-identify personal information that is no longer required for a specific purpose under the APPs.²⁴ The proposed privacy principle would complement these existing APPs. First, an individual would be empowered not only to request correction of personal information but also to request its deletion. Second, deletion would be required not only when the personal information is no longer useful but also when the individual requests its deletion.

15.27 As an APP, the proposed principle would engage the existing complaints and enforcement mechanisms of the Office of the Australian Information Commissioner. In particular:

- an APP entity's failure to comply with the principle would constitute an interference with the privacy of an individual under the *Privacy Act*;²⁵
- an affected individual could therefore make a complaint about the failure to the OAIC;²⁶ and
- a serious or repeated failure to comply with the principle would constitute a breach of a civil penalty provision, possibly resulting in pecuniary penalties.²⁷

21 Facebook, *Submission 65*.

22 For example, limits are placed on the destruction or alteration of Commonwealth records under the *Archives Act 1983* (Cth) s 24.

23 *Privacy Act 1988* (Cth) sch 1 cl 13.

24 *Ibid* sch 1 cl 11.

25 *Ibid* s 13(1).

26 *Ibid* ss 36, 40, 52.

27 *Ibid* s 13G.

Extending the deletion requirement for data-sharers

15.28 The ALRC has asked whether the proposed privacy principle should also require an APP entity to take additional steps where a deletion request is made and the relevant information has been shared with third parties. The ALRC has also asked what additional steps should be required in such cases. Some possible examples of additional steps include:

- requiring the APP entity who receives the request to provide the requesting individual with a list of third parties who have received the information; and
- requiring the APP entity who receives the request to notify any third parties with which it has shared the information that the request has been made.

15.29 The utility of any such additional requirements would likely depend on the extent to which personal information collected by one APP entity is shared with other APP entities. However, the ALRC also acknowledges that, depending on the steps required, this extension of the proposed privacy principle may introduce additional burdens on APP entities.

Regulator take-down orders

Question 15–2 Should a regulator be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:

- (a) the individual makes a request to the regulator to exercise its power;
- (b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and
- (c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests?

15.30 The new Australian Privacy Principle in Proposal 15–2 does not include any right for an individual to have personal information deleted or de-identified when that information is provided by a third party. There may, however, be merit in introducing a take-down mechanism by which an individual could apply to have such information removed from websites and other online services. As noted above, the rapid removal of privacy information from public websites may help prevent an invasion of privacy. Although some online service providers may offer a system for complaining about a serious invasion of privacy, others may not.²⁸

28 The ALRC previously considered a take-down system in ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [11.21]–[11.23]. However, the possibility of a take-down mechanism continues to be discussed, and so it has been raised again in this Discussion Paper.

15.31 A regulator take-down system may provide a mechanism for limiting the impact or serious invasions of privacy. However, there is also a risk that such a system may have an undesirably chilling effect on online freedom of expression. The ALRC has therefore sought comment on the desirability of a take-down system, but has not proposed a take-down system at this stage. Comments are sought on:

- whether any such take-down system is desirable;
- which regulator or regulators should be empowered to issue take-down orders;
- the circumstances in which a take-down order should be issued; and
- any ways in which negative impacts on free expression could be minimised.

15.32 If the statutory cause of action for serious invasion of privacy is enacted, an individual who has suffered a serious invasion of privacy may apply to a court for an injunction requiring the removal of private information.

15.33 However, applying for an injunction may be expensive and time-consuming for the affected individual. A take-down system operated by a regulator would potentially be a cheaper and quicker alternative. It may also be a more accessible alternative where the affected individual is a young person. The OAIC and the ACMA may be well-suited to exercising a power to order take-downs.

15.34 The ALRC has suggested a model whereby a take-down order could be issued if three conditions are met. First, the regulator must receive a complaint from an individual. This would ensure that the regulator could not order a take-down of its own motion. Second, the individual must have attempted, without success, to have the material removed by the organisation which controls the website or online service. This would ensure that individuals had attempted to deal with the matter themselves before engaging the regulator. Third, the regulator must consider that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests. This would ensure that take-downs would only be ordered where an invasion was serious and where there was no countervailing interest in freedom of expression or public interest.

15.35 As noted above, the Department of Communications is currently engaged in an inquiry into Online Safety for Children. As part of that inquiry, the Department has proposed a Commissioner with the power to issue a notice requiring the removal of material that is likely to harm a child. Such a notice could, under the Department's proposal, be directed to either the internet intermediary²⁹ or the individual who posted the material.

29 See Ch 10 on the meaning of 'internet intermediaries'.

Amicus curiae and intervener roles for the Australian Information Commissioner

Proposal 15–3 The *Privacy Act 1988* (Cth) should be amended to confer the following additional functions on the Australian Information Commissioner in relation to court proceedings relating to interferences with the privacy of an individual:

- (a) assisting the court as amicus curiae, where the Commissioner considers it appropriate, and with the leave of the court; and
- (b) intervening in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.

15.36 The ALRC has proposed that the Australian Information Commissioner be given new functions to act as amicus curiae or to intervene in legal proceedings relating to the information privacy. These functions would be additional to a range of existing functions conferred on the Commissioner under ss 27–29 of the *Privacy Act 1988* (Cth), including:

- specific functions under the *Privacy Act* (such as responding to complaints from individuals);
- guidance related functions (preparing guidance about and promoting understanding of the requirements of the *Privacy Act*);
- monitoring related functions (ensuring that APP entities are meeting the requirements of the *Privacy Act* and ensuring that any privacy impacts of new laws, practices or proposals are minimised); and
- advice related functions (providing advice about the operation of and compliance with the *Privacy Act*, and any need for legislative action).

15.37 These additional functions would be similar to functions conferred on other administrative bodies, such as the ACCC, ASIC and the Human Rights Commission.

The role of an amicus curiae

15.38 The role of an amicus curiae (‘friend of the court’) is to assist the court ‘by drawing attention to some aspect of the case which might otherwise be overlooked.’³⁰ An amicus curiae may ‘offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted’.³¹ This role does not extend to introducing evidence to the court, although an amicus may

30 *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J). On the role of an amicus curiae generally, see Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report 78 (1996) ch 6.

31 *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ).

be permitted to lead non-controversial evidence in order to ‘complete the evidentiary mosaic’.³² An amicus curiae is not a party to the proceedings and is not bound by the outcome of the proceedings. In *Re United States Tobacco Company*, Einfeld J noted the value of amici curiae, particularly as subjects of increasing complexity are brought before the courts:

The variegated complexity of modern life and technology, increasing materialism and the possible risks to the public of otherwise lauded scientific advances, have brought consequent significant legal challenges. These have been amplified not minimally by the burgeoning of statutory law expressing vague general principles and requiring the exercise of broad undefined judicial discretions. For the just resolution of these issues, the resultant mix beckons, if not requires, whatever assistance and expertise the Courts can reasonably muster.³³

15.39 An example of legislation conferring an amicus curiae function onto an administrative body can be found in s 46PV of the *Australian Human Rights Commission Act 1986* (Cth). This section allows individual Commissioners (‘special-purpose Commissioners’) within the Commission to act as amici curiae, with the court’s leave:

- (1) A special-purpose Commissioner has the function of assisting the Federal Court and the Federal Circuit Court, as amicus curiae, in the following proceedings under this Division:
- (a) proceedings in which the special-purpose Commissioner thinks that the orders sought, or likely to be sought, may affect to a significant extent the human rights of persons who are not parties to the proceedings;
 - (b) proceedings that, in the opinion of the special-purpose Commissioner, have significant implications for the administration of the relevant Act or Acts;
 - (c) proceedings that involve special circumstances that satisfy the special-purpose Commissioner that it would be in the public interest for the special-purpose Commissioner to assist the court concerned as amicus curiae.

15.40 Importantly, an amicus curiae does not have a legal interest in the outcome of proceedings. A person with a legal interest in proceedings may instead, with the leave of the court, intervene in the proceedings.

The role of an intervener

15.41 The role of amicus curiae can be distinguished from the role of an intervener. While the role of an amicus curiae is to assist the court, the role of an intervener is to represent the intervener’s own legal interests in proceedings.

15.42 An intervener’s legal interests may be affected in a number of ways. First, the intervener’s interests may be directly affected by the court’s decision. For example, a decision about the property interests of the parties to proceedings might also affect the

³² *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J).

³³ *Re United States Tobacco Company v the Minister of Consumer Affairs and the Trade Practices Commission* [1988] FCA 241 (14 July 1988) [68] (Einfeld J).

property interests of the intervener. Second, the intervener's interests may be less directly affected. For example, the court's decision might have an effect on the future interpretation of laws affecting the intervener.³⁴ Under the ALRC's proposal, a court might, for example, give leave to the Australian Information Commissioner to intervene in a case that would have future repercussions for the work of the OAIC.

15.43 Functions to intervene are conferred upon a number of administrative bodies. For example, s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) confers an intervention function on the Australian Human Rights Commission:

where the [Australian Human Rights Commission] considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues[.]³⁵

15.44 The Australian Competition and Consumer Commission (ACCC) has an intervention function in relation to proceedings under the *Competition and Consumer Act 2010* (Cth).³⁶ The Australian Securities and Investments Commission has an intervention function in relation to proceedings about consumer protection in financial services.³⁷

Other regulatory reforms

Small businesses

15.45 The APPs under the *Privacy Act 1988* (Cth) regulate the handling of personal information by APP entities, ie government agencies and organisations.³⁸ Notably, small businesses with an annual turnover of less than \$3 million³⁹ are exempt from the definition of 'organisation' and thus from the ambit of the APPs unless, for instance:

- the small business trades in personal information;
- the small business handles health information; or
- the small business operator notifies the OAIC in writing of its desire to be treated as an organisation.⁴⁰

15.46 In its 2008 report *For Your Information*, the ALRC recommended that the small business exemption be removed from the *Privacy Act*. Several stakeholders, in submissions to the ALRC's current Inquiry, noted that the exemption remains in the *Privacy Act*, and that the removal of the exemption would have benefits for privacy.⁴¹

34 *Levy v Victoria* (1997) 189 CLR 579, 601–602 (Brennan CJ).

35 The Australian Human Rights Commission also has intervention functions, see for example, *Australian Human Rights Commission Act 1986* (Cth) s 31(j); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb); *Racial Discrimination Act 1975* (Cth) s 20(e); *Disability Discrimination Act 1992* (Cth) s 67(1)(1); *Age Discrimination Act 2004* (Cth) s 53(1)(g).

36 *Competition and Consumer Act 2010* (Cth) s 87CA.

37 *Australian Securities and Investments Commission Act 2001* (Cth) s 12GO.

38 *Privacy Act 1988* (Cth) s 6(1) (definition of 'APP entity').

39 *Ibid* ss 6C, 6D.

40 *Ibid* ss 6D, 6E, 6EA.

41 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 39–1.

15.47 Ensuring that small businesses handle personal information in an appropriate way may be particularly important in the digital era. A small business in the digital era can readily collect personal information through, for example, software on mobile phones or websites.⁴² Removing the small business exemption may therefore provide for better information privacy protections in the digital era.

15.48 The ALRC acknowledges, however, that removing the small business exemption may have compliance costs for small businesses. The ALRC considers that the small business exemption should be given further consideration, particularly given the growth of digital communications and the digital economy since the 2008 recommendation. The Productivity Commission, for instance, may be well-placed to investigate the likely impacts on small businesses if the small business exemption were removed. Such an investigation could give detailed consideration to the application of limited data protection models to small businesses in other jurisdictions⁴³ as well as other options for improving the protection of personal information held by small business.⁴⁴

An extended complaints process for the OAIC

15.49 In its submission to Issues Paper 43, the Office of the Australian Information Commissioner outlined a proposal for a new ‘complaints model’. The OAIC suggested that this model could provide an alternative to the statutory cause of action for serious invasions of privacy. A core element of the OAIC’s proposal would be a new power granted to the Australian Information Commissioner to receive complaints from individuals about intrusions into seclusion. This new power would extend the existing powers of the Commissioner to hear complaints about breaches of the APPs.

15.50 An intrusion into seclusion would, under the OAIC’s proposal, constitute an ‘interference with the privacy of an individual’.⁴⁵ This would allow the individual to bring a complaint to the Commissioner,⁴⁶ or for the Commissioner to undertake an own motion investigation.⁴⁷ In the event that the Commissioner determined that an intrusion into seclusion had occurred, the existing powers of the Commissioner would allow for

42 ‘Mobile Apps’ (Occasional paper 1, Australian Communications and Media Authority, May 2013); ‘The Cloud—services, Computing and Digital Data’ (Occasional paper 3, Australian Communications and Media Authority, June 2013); ‘Mobile Privacy: A Better Practice Guide for Mobile App Developers’ (Office of the Australian Information Commissioner, September 2013).

43 *Data Protection Act 1998* (UK).

44 For example, the small business exemption could be limited so that small businesses handling sensitive information would not be exempt. Sensitive information includes personal information about an individual’s racial or ethnic origin, political opinions, membership of political associations, religious beliefs or affiliations, philosophical beliefs, professional or union membership, sexual orientation or practices or criminal record, as well as health information, genetic information, and certain types of biometric information: *Privacy Act 1988* (Cth) s 6(1) (definition of ‘sensitive information’).

45 *Ibid* s 6(1) (definition of ‘interference with the privacy of an individual’).

46 *Ibid* s 36.

47 *Ibid* s 40.

a range of declarations to be made.⁴⁸ A determination of the Commissioner would then be enforceable through the Federal Court or Federal Circuit Court.⁴⁹

15.51 In the event that the intrusion into seclusion was serious or repeated, the intrusion would be a contravention of a civil penalty provision. The Commissioner would then be empowered to apply to the Federal Court or Federal Circuit Court for an order that the respondent pay a civil penalty.⁵⁰

15.52 The ALRC acknowledges that the OAIC's proposed complaints model may offer several advantages over other methods of dealing with privacy disputes, in particular through litigation. Most significantly, the complaints model may be cheaper and faster than litigation, and may be less taxing on parties to a dispute. The complaints model would also take advantage of the OAIC's existing powers and expertise in handling complaints about information privacy.

15.53 However, the OAIC's proposed complaints model would face several challenges. First, as noted by the OAIC in its submission, the model would require substantial additional OAIC resourcing, particularly if the complaints process were to be readily available across the country. Second, also as noted by the OAIC, the respondents to complaints under the existing *Privacy Act* are typically government agencies and large businesses. Although it may be possible to extend the *Privacy Act* to include complaints against individuals more generally, such an extension may have significant consequences which would need detailed consideration. Third, the *Privacy Act* contains a range of exemptions, such as the small business exemption noted above. While these exemptions remain in place, a complaints process based on the *Privacy Act* would have significant limitations.

15.54 For these reasons, the ALRC has not proposed extending the *Privacy Act* or the powers of the Australian Information Commissioner in the way proposed in the OAIC submission. However, the ALRC notes that further consideration of the complaints model may be appropriate in the future.

48 These declarations could include: that the complainant is entitled to an amount of compensation; that the respondent should perform specific actions to ensure that the intrusion does not occur again; or that the respondent should perform specific actions to redress any loss or damage suffered by the complainant.

49 Ibid s 52.

50 Ibid ss 13G, 80U, 80W, 80X.

